Department of Labor and Industry
Board of Personnel Appeals
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 16-2009

JAMES MILLIGAN Complainant, -vs- MONTANA FEDERATION OF STATE PRISON EMPLOYEES LOCAL 4700, MEA-MFT, AFL-CIO Defendant,	)	INVESTIGATIVE REPORT AND NOTICE OF INTENT TO DISMISS

I. Introduction

On March 3, 2009, James Milligan, a Correctional Officer at the Montana State Prison (MSP) filed an unfair labor practice charge with the Board of Personnel Appeals against the Montana Federation of State Prison Employees Local 4700, MEA-MFT, AFL-CIO, hereafter MFSPE, MEA-MFT or Local 4700, alleging that "The executive board was suppose (sic) to give me a registered letter stating why they chose not to take it [a grievance] to arbitration. I then would have a right to appeal their decision. They committed an unfair labor practice for not allowing me to appeal their decision." Mr. Milligan is not represented by counsel.

Tom Burgess, Field Representative with the MEA-MFT, filed a response to the charge on behalf of Local 4700. The response denied any violation of the Montana law by either MFSPE or MEA-MFT.

John Andrew was assigned by the Board to investigate the charge and has communicated with the parties in the course of the investigation.

II. Discussion

James Milligan has been a Correctional Officer (CO) at the MSP for approximately 21 years. During his employment CO Milligan has been a member and officer in the MFSPE, MEA-MFT so he is very familiar with MFSPE, MEA-MFT workings and processes.

Article 14 of the collective bargaining agreement (cba) between the MSP and MFSPE, MEA-MFT provides for a grievance procedure to resolve disputes over contract interpretation. The grievance procedure culminates in final and binding arbitration.

In September of 2008, CO Milligan filed a step one grievance contending that he was required to work mandatory overtime even though he had submitted medical information relieving him from overtime requirements. The step one grievance was denied on September 15, 2008, with the management response citing provisions of Article 11, Subsection 4 of the cba relating to mandatory overtime. CO Milligan appealed that response.

On September 24, 2008, Warden Mike Mahoney responded to the grievance at step 2. He provided additional rationale for the denial. As per the understanding between the parties as to how communications on grievances were to be handled this response was copied to the MFSPE, MEA-MFT and to Tom Burgess. CO Milligan appealed the decision of Warden Mahoney.

On October 15, 2008, Department of Corrections Director Mike Ferriter denied the grievance at step three with a copy of his response sent to Mr. Burgess as well as MFSPE, MEA-MFT.

Attached to the unfair labor practice complaint filed with the Board of Personnel Appeals is a document containing what appears to be an original signature of CO Milligan. That document purports to be one addressed to the "Grievance Committee" dated October 17, 2008, requesting that the committee "Please consider taking this to step 4 (arbitration)". From what can be garnered by the investigator through an unsigned MFSPE Constitution (submitted to the investigator by CO Milligan and referencing the year 1996) as well as through conversations with the parties, what actually is meant to transpire (and apparently the formal names of the committees) is that a member's grievance is to be reviewed by the Stewards' Council. If step three is complete the grievance is taken by the chair of the Stewards' Council, who is also a member of the Executive Council of Local 4700, to the Executive Council so that body might determine whether or not a grievance should proceed to binding arbitration. According to CO Milligan he never received a response from the Executive Council, or executive board as he refers to it in his complaint. Furthermore, CO Milligan contends he never received a hearing before the Executive Council so he could argue the merits of proceeding to arbitration on his grievance, nor for that matter did he receive a certified letter from the Council denying either his request for an opportunity to be heard, or in the alternate denying his request that his grievance proceed to arbitration. CO Milligan contends that this lack of action is a breach of established grievance practice handling procedures and is the basis of his unfair labor practice.

During the pendency of the James Milligan grievance the MFSPE, MEA-MFT was also grieving the imposition of mandatory overtime on bargaining unit members as a whole. Suffice to say, the MFSPE, MEA-MFT disagreed with management over the interpretation of Article 14, Subsection 4 of the cba, the section at the very heart of CO

Milligan's grievance as well. All of this leads to the fact that from Step 2 on someone – most likely on the Stewards' Council - in MFSPE, MEA-MFT was sent copies of the management responses of MSP. Additionally, through the grapevine if through nothing else, there was an awareness that James Milligan had a grievance specific to his requested medical relief from mandatory overtime. It is also abundantly clear that there was an overall awareness that a more global grievance on mandatory overtime was pending at the MSP. With this background, there was a series of conversations, including a conference phone call, involving CO Milligan, Eric Feaver, Erik Burke and Tom Burgess, all of MEA-MFT, pertaining to the specific Milligan grievance as well as the more global mandatory overtime grievance. Ultimately, on January 23, 2009, Eric Feaver wrote to James Milligan advising him that after thorough review and after consulting with counsel the decision was made that the interpretation of when mandatory overtime could be imposed was going to final and binding arbitration. Mr. Feaver also advised CO Milligan:

> "If the arbitrator concludes overtime can only be imposed during emergency situations, it will not be necessary in this grievance to resolve whether a correctional officer can be excused form mandatory overtime because of a disability. That issue, however, will remain unanswered if the arbitrator rules against us."

Eric Feaver's letter was copied to members of the MFSPE, MEA-MFT Stewards' Council, and Executive Council as well as to MEA-MFT staff and outside counsel retained to handle the arbitration. In short, this letter is not saying that the Milligan grievance is being ignored. It is saying that the decision was to essentially include it in the overall mandatory overtime grievance where it may find resolution. Of particular note to the investigator is the fact that Article 14, Section 2, C in addressing grievance and arbitration procedures provides:

> "A grievance not filed or advanced by the grievant within the time limits provided shall be considered to be withdrawn; however, a grievance that is a recurring grievance may be refilled (sic) by the employee."

Of additional import to the investigator is an e-mail exchange (a portion of which is cited verbatim below) between the investigator and CO Milligan. When asked for further detail on his efforts to get the Executive Council to review his grievance CO Milligan responded as follows:

> "On December 12, 2009 I received an e-mail from CO Bruce Straughn (currently president of local 4700 as of April 2009). In the e-mail he states that he has been in communication with Mike Mcgaughy (a current e-board member and an e-board member during my grievance time frame.) McGaughy told Straughn that he had just got off the phone with Tom burgess you know what I will just paste the content of the e-mail
>
> *I asked Mike McCaughey yesterday morning what the status of the grievance was. He told me he didn't know but he would call Tom Burgess and find out. At about 1400 Mike said he just got off the phone with Tom and Tom assured him that the grievance is going*

to arbitration and that they have hired an outside attorney to handle it. They are also going to include the situation with the medical excuses in the arbitration.

Bruce

After hearing this, I felt that at least they are proceeding with my grievance to arbitration. Allthough I disagreed with the two grievance being tied to one, it was acceptable to me."

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using Federal Court and National Labor Relations Board (NLRB) precedent as guidelines in interpreting the Montana Collective Bargaining for Public Employees Act, State ex rel. Board of Personnel Appeals vs. District Court, 183 Montana 223 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 vs. State ex rel. Board of Personnel Appeals, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME Local No. 2390 vs. City of Billings, Montana 555 P.2d 507, 93 LRRM 2753. To the extent cited in this decision, federal precedent is considered for guidance and to supplement state law when applicable.

The gravamen of James Milligan's complaint is that by not allowing him to appear before the union to argue why his case should go to arbitration and by therefore not proceeding to arbitration Local 4700 did not fairly represent him, a violation of 39-31-402 MCA. A union violates its duty of fair representation to the employees it represents only if its actions are "arbitrary, discriminatory or in bad faith . . ." Vaca v. Sipes, 386 U.S. 171,190 [64 LRRM 2369] (1967). To determine if the duty to fairly represent has been breached each element in the three part standard must be examined, Airline Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 77 [136 LRRM 2721] (1991). The Board of Personnel Appeals has adopted the Vaca standard and in Ford v. University of Montana and Missoula Typographical Union No. 277, 183 MT 112, 598 P.2d 604, (Mont 1979) the Montana Supreme Court in reviewing an unfair labor practice charge brought before the Board held:

> In short, the Court has to find that the Union's action was in some way a product of bad faith, discrimination, or arbitrariness. The mere fact that Bonnie Ford disagrees with the decision of the Union [in determining that her grievance was without merit] is not sufficient basis for a finding of breach of the duty of fair representation absent these factors.

The Montana Supreme Court has also recognized that "it is well settled in federal labor law and therefore under Montana labor law that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner". Teamsters Local #45, Affiliated with International Brotherhood of Teamsters vs. State of Montana ex. rel Board of Personnel Appeals and Stuart McCarvel, 635 P.2d 1310, 38 St.Rep 1841 (1981), 43 St Rep 1555 (1986).

Applying the arbitrary prong to the allegations made by James Milligan CO Milligan has argued that Local 4700 violated the methodology used to process grievances. He is correct to some degree as apparently there was a method wherein the Stewards'

Council and/or the Executive Council had, at least in the past, afforded a member the opportunity to appear and argue why their grievance should move forward. That did not happen, at least in any formal fashion. In the same vein, apparently in the past, the Executive Council sent a registered letter to a grievant advising the grievant of their decision to not proceed to arbitration and affording an opportunity to be heard. In this case the letter was not sent although it is not clear that a letter was required other than it did happen during the tenure of the previous MEA-MFT field representative. Regardless of these possible procedural shortcomings the fact remains that there was extensive dialogue between MEA-MFT and CO Milligan on the pros and cons of his grievance. The opportunity to express his views was never denied to CO Milligan nor was the grievance handled in a perfunctory manner. The MEA-MFT staff and officers and representatives of the local appear to have fully communicated with one another and CO Milligan about not only his grievance but the overall grievance on mandatory overtime as well. CO Milligan suffered no prejudice in this as under the contract there does not appear to be a prohibition from pursuing his grievance again if not otherwise resolved. Moreover, there is no evidence he has suffered any disciplinary action as a result of this question of contract interpretation and at present, so far as the investigator has determined, CO Milligan has been required to work but two overtime shifts by MSP. In short, should Local 4700 prevail before the arbitrator selected to hear the mandatory grievance case CO Milligan will also prevail on his grievance. Although CO Milligan may disagree with the actions taken to date it simply is not the case that they were taken in an arbitrary fashion nor was CO Milligan treated in an arbitrary manner.

The second prong of the test for a breach of the duty of fair representation is discrimination. There are no allegations made, nor is there any evidence found by the investigator that the MFSPE, MEA-MFT discriminated against James Milligan in any fashion. That prong of the test is satisfied.

In terms of the third prong of the test, bad faith, the good-faith conduct of a union is preserved unless it can be demonstrated that the conduct is sufficiently outside a "wide range of reasonableness" so as to be considered irrational. To establish a lack of good faith there must be evidence of fraud, deceitful action, or dishonest conduct by the union, Schmidt v. Electrical Workers (IBEW) Local 949, 980 F.2d 1167, 141 LRRM 3004 (8th Cir. 1992) and Aguinaga v. Food & Commercial Workers, 993 F.2d 1167, 143 LRRM 2400 (10th Cir 1993) Cert. Denied 510 U.S. 1072, 145 LRRM 2320 (1994). And, as the Ninth Circuit held, there is a mandated deferential standard of review in evaluating union actions and they can be challenged successfully only if wholly irrational and even "unwise" or "unconsidered" union decisions will not rise to the level of irrational conduct, Stevens v. Moore Bus. Forms, 18 F3d. 1443, 145 LRRM 2668 (9th Cir. 1994). Here there is no evidence of bad faith on the part of MFSPE, MEA-MFT. There may well be a disagreement between CO Milligan and the union as to how best to proceed, but there was, and is, a rational basis for the MFSPE, MEA-MFT to address the global issue of mandatory overtime in the belief that a successful outcome in that arbitration will resolve CO Milligan's issue as well. It is not for the Board of Personnel Appeals to second guess such a decision as that strategy may well work. The union is in a far better position than the Board of Personnel Appeals to make that call. To be

certain, addressing the global dispute with the MSP over mandatory overtime has advantages, including arguing circumstances similar to CO Milligan's before the arbitrator, than does taking on individual issues with their separate peculiarities. And again, there seems to be no bar to CO Milligan filing another grievance should Local 4700 lose on the global issue.

A specific note by the investigator is in order. During the pendency of this matter consideration was given to defer this matter to the arbitration procedure. See Collyer Insulated Wire, 192 NLRB 387, 77 LRRM 1931 adopted by the Board of Personnel Appeals in ULP 43-81, William Converse v Anaconda Deer Lodge County and ULP 44-81 James Forsman v Anaconda Deer Lodge County, August 13, 1982. Two problems exist if that were done. First, CO Milligan's grievance is not moving forward on its own so there is no arbitration process to which to defer nor is it known whether the employer or the union would abide by such a determination. Second, the real nature of CO Milligan's complaint is an allegation of a breach of the duty of fair representation. Arbitration would not resolve that issue. Rather the question is whether there is substantial evidence to warrant a finding of probable merit and ultimately a preponderance of evidence to prove that an unfair labor practice was committed by the union. There is a lack of substantial evidence to warrant a finding of probable merit. Even though CO Milligan's complaint is correct that the apparent grievance process may not have been followed to the letter, the nature of James Milligan's complaint does not rise to the level of a breach of the duty of fair representation. This matter warrants dismissal, not deferral.

III. Recommended Order

It is hereby recommended that Unfair Labor Practice Charge 16-2009 be dismissed.

DATED this ___6th_____ day of _____May_____ 2009.

BOARD OF PERSONNEL APPEALS

By: _____/S/_____
John Andrew
Investigator

NOTICE

Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss may be appealed to the Board. The appeal must be in writing and must be made within 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the Board at P.O. Box 6518, Helena, MT 59604-6518. If an appeal is not filed the decision to dismiss becomes a final order of the Board.

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CERTIFICATE OF MAILING

I, _____ , do hereby certify that a true and correct copy of this document was mailed to the following on the _____ day of _____ 2009, postage paid and addressed as follows:

JAMES MILLIGAN
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